

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID E. GREEN,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 233780

Wayne Circuit Court

LC No. 00-009277-01

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant David Green of possession of less than fifty grams of heroin with intent to deliver.¹ The trial court sentenced him to life probation. He appeals as of right. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

The prosecutor charged Green with delivery of less than fifty grams of heroin and possession with intent to deliver. At the outset of the trial, the trial court ordered that all witnesses for the prosecution and the defense be sequestered, except for the officer in charge. When the trial court asked whether the attorneys had “seen to it,” the prosecutor responded that his witnesses were all outside the courtroom. Defense counsel did not respond.

The prosecutor then presented his proofs. The evidence showed that Green was loitering outside a house where he was seen giving a person something in exchange for cash, going inside the house, and returning outside. He did this with three different people. After the third transaction, but before Green went into the house again, the police arrested him and a buyer. The police then discovered that, in his left hand, Green was holding a plastic bag “containing 16 neon lottery packs” of suspected heroin. He also had \$10 cash in his pocket. The buyer, Dion Taylor, was holding “a neon piece of paper” containing suspected heroin. Laboratory tests revealed that two of Green’s lottery packs contained 0.05 grams of heroin. Taylor’s piece of paper held 0.03 grams of heroin.

¹ MCL 333.7401(2)(a)(iv).

After the prosecutor rested, defense counsel called Dorothy Green to testify. She had been sitting in the courtroom during the prosecutor's case-in-chief. When the trial court pointed out that it had issued a sequestration order, defense counsel responded:

Mr. Laster [defense counsel]: I didn't turn around.

The Court: And I said, "Have you seen to it," and I waited.

Mr. Laster: I . . .

The Court: And she's been sitting in this courtroom the entire time . . .

Mr. Laster: I won't call her, then.

Defense counsel then called Dwayne Simpson, prompting the trial court to say:

The Court: He's been sitting in the courtroom the entire time.

Mr. Laster: Your Honor, I didn't turn around at the time.

The Court: But I ordered sequestration, and I gave you time to do it. Why is it people think I only kick police officers out of the courtroom? If I'm going to let witnesses sit here, they can all sit here.

Mr. Laster: Your Honor, Mr. Simpson was issued a citation at the time . . .

The Court: Well, I don't care what happened. He can't testify because he's been sitting here through the entire testimony.

The only witness to testify for the defense was Green himself. Green said Simpson and a man named McGhee were parked outside the house smoking weed, and he was standing there talking to them. When Taylor approached them, the police suddenly appeared. The police issued citations to Green and Simpson, and possibly McGhee. However, the police took back Green's citation, "balled it up, and told me I was going to jail with Mr. Taylor" without telling him why he was being arrested. Green denied that he had any drugs in his possession.

Having heard this evidence, the trial court was not convinced beyond a reasonable doubt that Green delivered the heroin found in Taylor's possession. Accordingly, the trial court only convicted him of possession with intent to deliver.

II. Standard Of Review

Green's sole issue on appeal is that the trial court erred in precluding Dorothy Green and Simpson from testifying because they had violated the sequestration order. In his view, the trial court's ruling with respect to these two witnesses violated his constitutional right to present a defense. However, whether to bar testimony from a witness who violated a sequestration order

is an evidentiary issue entrusted to the trial court's discretion, meriting review for an abuse of that discretion.²

III. Sequestration Violation

Green's argument requires, at the outset, one critical factual correction. The trial court did not bar Dorothy Green from testifying. Rather, defense counsel chose not to have her testify following the trial court's initial comment about the sequestration order. Apparently, in withdrawing Dorothy Green as a witness, defense counsel was attempting to smooth the situation caused by his failure to ensure that all defense witnesses had left the courtroom. Whatever his reasons, defense counsel's action, not the trial court's, kept Dorothy Green from testifying. This amounted to a waiver of this issue, which extinguished any error.³

The trial court did, however, rule that Simpson could not testify because he had violated the sequestration order. Several factors reveal that this was not an abuse of the trial court's discretion. Simpson apparently knowingly violated the order and defense counsel failed to ensure that his witnesses obeyed the order.⁴ The trial court correctly concluded that this sort of disobedience and negligence required sanctions. Additionally, Green did not make an offer of proof of Simpson's intended testimony. Nor did Green demonstrate that Simpson had vital evidence that no other witness who could be procured within a reasonable time would be able to provide to the trial court.⁵ Consequently, the trial court had no reason to believe that it was prohibiting an important aspect of the defense in precluding this witness from testifying.

Further, the trial court recognized that, having heard the evidence the prosecutor presented, Simpson was more likely to be able to tailor his own testimony to serve the defense, regardless of the truth. Green notes that the prosecutor's witnesses and Simpson were adverse to each other and, therefore, Simpson would have had no reason to testify consistently with them. However, the risk in this case is that Simpson would be able to provide directly *contradictory* testimony in an effort to diminish the effect the prosecutor's witnesses had on the trial court. Fabrications of this sort are every bit as troubling as fabrications by witnesses who give parallel testimony because their interests are aligned.

Green also suggests that a trial court sitting as the fact finder is less susceptible to improper testimony than a jury. However, in comparison to a jury, the trial court's greater skill exists in its ability to know and understand the law, not in being able to sort the truth from fabrications.⁶ As concerns factual issues, juries and trial courts are essentially equal in that both entities rely on human judgment to discern the truth from a lie and to weigh the comparative value of the evidence. Thus, the trial court in this case had a legitimate concern about the effect

² See *People v Nixten*, 160 Mich App 203, 209; 408 NW2d 77 (1987).

³ See *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001).

⁴ See *People v Emmett Jones*, 75 Mich App 261, 277-278; 254 NW2d 863 (1977).

⁵ See *People v Dickerson*, 62 Mich App 457, 460; 233 NW2d 612 (1975).

⁶ See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Edward Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Simpson's testimony, tainted by his knowledge of the prosecutor's evidence, would have on the trial court's ultimate decision concerning Green's guilt or innocence.⁷

In light of all these factors, we see no abuse of discretion in the trial court's decision to bar what had become unreliable testimony from Simpson.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly

⁷ See *Emmett Jones, supra* at 278.